

JONES DAY

51 LOUISIANA AVENUE, N.W. • WASHINGTON, D.C. 20001-2113

TELEPHONE: (202) 879-3939 • FACSIMILE: (202) 626-1700

Direct Number: (202) 879-7600
delsmith@jonesday.com

December 15, 2009

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Dear Ms. Dortch:

Re: *Petition for Protection from Whipsawing and Stop Settlement Payment
Order on the U.S. Tonga Route,
IB Docket No. 09-10*

This is a request on behalf of Digicel (USA), Inc. ("Digicel USA") for access under a protective order to information submitted to the International Bureau (the "Bureau") by nine U.S. carriers in this docket under requests for confidential treatment for part or all of such information.

This proceeding concerns a petition by AT&T Inc. for the Commission to order U.S. carriers to stop settlement payments to Tonga Communications Corporation ("TCC") and to Digicel (Tonga), Ltd. ("Digicel Tonga") in response to alleged whipsawing practices on the U.S.-Tonga route and as a result of TCC's alleged disruption of AT&T's circuits providing direct service to Tonga. In an effort to secure information regarding service on the U.S.-Tonga route to assist in its consideration of AT&T's petition, the Bureau requested, pursuant to the *International Settlement Rates Reform Order*,¹ the nine carriers (and four others that did not request confidential treatment of their responses) to provide the Commission with information regarding service on the U.S.-Tonga route.² The requests for information contained four questions concerning whether the carriers (a) provide or provided facilities-based IMTS service between the United States and Tonga in 2008 and/or 2009, (b) maintain wholly or jointly owned direct circuits between the United States and Tonga, (c) had any direct circuits disrupted, and (d) provide or provided during 2008 and/or 2009 service to or from Tonga via an "alternative operating arrangement (e.g., through a third party or country)."

The nine carriers responded to the Bureau's information request between February 27 and March 20, 2009 requesting that the information submitted be either fully or partially treated as confidential. In most cases, the responding carriers cited sections 0.457 and 0.459 of the Commission's rules in support of

¹ *International Settlement Policy Reform; International Settlement Rates*, 19 FCC Rcd 5709 (2004).

² The Bureau issued its requests for information to the carriers in this docket by letters dated February 18 and 19, 2009.

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their requests, asserting that the information in question is commercially sensitive and contains trade secrets that are not routinely disclosed to third persons.³

By order dated June 15, 2009, the Bureau ordered all U.S. authorized facilities-based carriers serving the Tonga route to stop settlement payments to TCC. By order dated November 16, 2009, the Bureau extended its stop payment order to include settlement payments to Digicel Tonga. By letter dated November 19, 2009, the Bureau advised counsel for Digicel USA that “[i]nformation provided in the above-captioned proceeding [Docket 09-10] indicates that Digicel USA has arrangements that appear subject to the restrictions specified in the Bureau’s order.” The “restrictions” addressed in the Bureau’s order are the requirements to stop settlement payments to TCC and Digicel Tonga.

Because neither the initial *Tonga Stop Payment Order* applicable to TCC, nor the *Second Tonga Stop Payment Order* applicable to Digicel Tonga contained any reference to Digicel USA, and Digicel USA had not received a written request for information from the Bureau, the undersigned on November 30, 2009 asked Mr. James Ball, Chief, Policy Division of the Bureau, in a conversation what “information” was provided in the proceeding to lead the Bureau to its conclusion. Mr. Ball replied that information supplied in one or more of the responses by U.S. carriers to the Bureau’s request for information had identified Digicel USA as a carrier through which the responding carrier(s) sent traffic indirectly to Tonga for termination.

Digicel USA is not identified in any of the four responses filed by U.S.-authorized carriers that did not request confidential treatment for the information submitted.⁴ As a result, Digicel USA must conclude that one or more of the nine carriers that requested full or partial confidential treatment is the source of information on which the Bureau relied in its November 19, 2009 letter to the undersigned. In order for Digicel USA to respond in an informed and meaningful manner, it requires access to inspect the information submissions in question.

In order to allow such disclosure to Digicel USA while protecting the confidentiality interests claimed by the nine U.S.-authorized carriers in question,⁵ Digicel USA is prepared to enter into a

³ Bharti Airtel Limited, March 2, 2009 (request for confidential treatment of all information); France Telecom Long Distance USA, LLC, March 2, 2009 (request for confidential treatment of all information); IDT Corporation, March 2, 2009 (request for confidential treatment of all information); New Century Infocomm Tech Co., Ltd., March 3, 2009 (request for confidential treatment of all information); REACH Services (USA) Inc., March 3, 2009 (request for confidential treatment of all information); Sprint Nextel, March 3, 2009 (request for confidential treatment of all information); Telecom New Zealand (date not certain; response withheld from disclosure in its entirety); TeliaSonera International Carrier, Inc., February 20, 2009 (request for confidential treatment of paragraph 4 of its response); Verizon (MCI International), March 2, 2009 (request for partial confidential treatment for response to question 4).

⁴ See responses of IT&E Overseas, Inc., February 20, 2009; KDDI America, Inc., March 2, 2009; KPN International Network Services, Inc., March 9, 2009; and Primus Telecommunications, Inc., March 9, 2009.

⁵ Digicel USA takes no position at this time regarding whether the information for which the carriers request confidential treatment is properly withheld from public disclosure pursuant to sections 0.457 or 0.459 of the Commission’s rules.

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protective order limiting the requested disclosure to its counsel, both in-house and external, engaged in the conduct of this proceeding. Disclosure would also be permitted for associated paralegals and clerical staff necessary to render professional services in this proceeding, as well as technical or other specialists whose expert advice or services are required to prepare material assisting counsel in formulating filings in this proceeding. The Commission routinely balances the competing interests of protecting confidential information and allowing parties to participate effectively in its proceedings by providing for the limited release of information claimed to be confidential under protective orders.⁶

Earlier in this proceeding, the Bureau denied a request by AT&T for a protective order as a means of gaining access to information submitted under a request of confidentiality by TCC regarding details of its rate to terminate traffic for Digicel Tonga as well as details regarding TCC's and Digicel Tonga's universal service obligations in Tonga.⁷ The Bureau's action with regard to that request is distinguishable from Digicel USA's present request on at least two fundamental bases.

First, the Bureau noted that the information submitted by TCC in an *ex parte* meeting with the Bureau staff was provided voluntarily, and not pursuant to a Bureau order or request. The Bureau cited judicial authority for the proposition that voluntarily submitted information is entitled to "an even stronger presumption for confidential treatment...and disclosure of the information would jeopardize the ability to obtain such data on a cooperative basis."⁸ In the present case, however, the carriers in question requesting confidential treatment of the information they have submitted operate under FCC jurisdiction, and were required to make the filings in question. Therefore, the concern cited by the Commission of a chilling effect on future efforts of the Commission to secure information on a voluntary or cooperative basis is not applicable to the U.S.-authorized carriers' information here at issue, and the Bureau faces a much more substantial burden of demonstrating that disclosure of such information would jeopardize its information gathering capabilities at a future date.⁹

Second, the Bureau pointed out that AT&T had no pressing need for the information to which access was requested because the Bureau had granted AT&T's request for the stop payment order without taking into consideration the information in question.¹⁰ In the present case, on the other hand, the Bureau has made clear to Digicel USA that it has relied on the information to which Digicel USA seeks access for the Bureau's conclusion that the company is subject to the stop payment order applicable to Digicel Tonga. Under these circumstances, Digicel USA has made a "persuasive showing" of a need for access to the information in question in order to participate in this proceeding effectively.¹¹ On the other hand,

⁶ *Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission*, 13 FCC Rcd 24816, 24831-37 (1998), *reconsideration denied*, 14 FCC Rcd 20128 (1999).

⁷ 24 FCC Rcd 8026 (released June 15, 2009).

⁸ *Id.*, at 8030.

⁹ See court discussion of this policy issue in *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871 (D.C.Cir. 1992), *cert. denied*, 507 U.S. 984 (1993).

¹⁰ 24 FCC Rcd. at 8030.

¹¹ 13 FCC Rcd at 24820.

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disclosure of the information to Digicel USA will not compromise the Commission's ability to ask for such information on future occasions from other authorized carriers.

In any case, Digicel USA is willing to accede to the terms of a Bureau approved protective order that will limit disclosure of the information to counsel and other professionals involved in the development of the record in this proceeding. The public interest, therefore, weighs strongly in favor of limited disclosure against any actual lack of harm that the disclosing carriers will suffer.

Very truly yours,



Delbert D. Smith
Counsel to Digicel (USA), Inc.

cc: Mindel de la Torre, Chief, International Bureau
James Ball, International Bureau
David Krech, International Bureau
Kimberly Cook, International Bureau
Cara Grayer, International Bureau
Emily Talaga, International Bureau
Karen Zacharia, Verizon (MCI International)
Robert Aamoth, Kelley Drye & Warren LLP
David A. Nall, Sprint Nextel
Michelle Cohen, Thompson Hine
Brian McHugh, TeliaSonera International Carrier, Inc.
William K. Coulter, Baker & McKenzie
Carl Billek, IDT Corporation

CERTIFICATE OF SERVICE

I, Joyce Dozier, certify that copies of the foregoing Digicel (USA), Inc. *Request for Protective Order* were delivered via e-mail on this day, Tuesday, December 15, 2009 to the following:

Mindel De La Torre
Bureau Chief, International Bureau
Federal Communications Commission
Mindel.DeLaTorre@fcc.gov

James Ball
Chief, Policy Division
International Bureau
Federal Communications Commission
James.Ball@fcc.gov

David Krec
Associate Chief, Policy Division
International Bureau
Federal Communications Commission
David.Krec@fcc.gov

Kimberly Cook
Policy Division
International Bureau
Federal Communications Commission
Kimberly.Cook@fcc.gov

Cara Grayer
Policy Division
International Bureau
Federal Communications Commission
Cara.Grayer@fcc.gov

Emily Talaga
Strategic Analysis & Negotiations Division
International Bureau
Federal Communications Commission
Emily.Talaga@fcc.gov

Best Copy and Printing
fcc@bcpiweb.com

James Talbot
General Attorney
AT&T Inc.
jjtalbot@att.com

Karen Zacharia
Katharine Saunders
Leslie Owsley
Verizon
karen.zacharia@verizon.com
katharine.saunders@verizon.com
leslie.v.owsley@verizon.com

Robert J. Aamoth
Joan M. Griffin
Kelley Drye & Warren LLP
raamoth@kellydrye.com
jgriffin@kellydrye.com

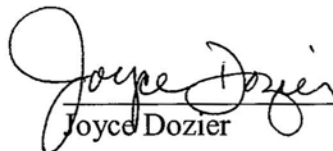
Carl Billek
IDT Corporation
carl.billek@corp.idt.net

William K. Coulter
Baker & McKenzie LLP
william.k.coulter@bakernet.com

Michelle Cohen
Thompson Hine LLP
michelle.cohen@thompsonhine.com

David A. Nall
Sprint Nextel
David.A.Nall@sprint.com

Brian McHugh
TeliaSonera International Carrier, Inc.
brian.mchugh@teliasonera.com


Joyce Dozier